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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 697

GARFIELD A. BERLINSKY, PETITIONER

v.

TIGHE E. WOODS, HOUSING EXPEDITER, WALTER R. HEATH, AREA HOUSING EXPEDITER, JOSEPH DEEGAN, SHERIFF OF BALTIMORE CITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 16) is not reported. The opinion of the Court of Appeals (R. 27) is reported at 178 F. 2d 265.

JURISDICTION

The judgment of the court below was entered on December 6, 1949. On March 3, 1950, petitioner's

time for filing a petition for a writ of certiorari was extended by order of the Chief Justice to March 20, 1950, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

Petitioner filed a complaint in the United States District Court for the District of Maryland against the respondents requesting that court to order the Housing Expediter, whose official residence is in Washington, D. C., to institute legal proceedings against petitioner's landlords to prevent petitioner's eviction from premises rented by him. The questions presented are:

1. Whether, in the absence of a general appearance by the Housing Expediter, service made upon him at his official residence in Washington, D. C., gave the United States District Court for the District of Maryland jurisdiction over his person.

2. Whether the Housing Expediter was such an indispensable party to the suit that his dismissal therefrom required the suit to be dismissed as to the other respondents.

3. Whether the district court had jurisdiction to proceed with the case in the absence of a showing that the amount involved exceeded the sum of $3,000.

4. Whether the complaint stated a claim upon which relief could be granted.

STATUTES INVOLVED

The pertinent provisions of the statute involved are set forth in Appendix A, *infra,* pp. 17-18.

STATEMENT

Petitioner was the tenant of premises situated at 857 North Howard Street, Baltimore, Maryland (R. 2). From 1933 petitioner had occupied the property under a written lease entitled "Contract for Renting Warehouses" pursuant to which he paid $40.00 a month for use of the building as an "Antique Shop and dwelling" (R. 2, 3, 6). The lease was on a month-to-month basis and subject to termination by either party on thirty days' written notice (R. 7). It was not registered under the Rent Regulations issued under the Federal Rent Control Acts because the landlords regarded the property to be predominantly business in character (R. 17, 28). On or about April 29, 1947, petitioner received a written notice from his landlords to vacate the premises on or before May 31, 1947 (R. 8). When petitioner failed to move, an eviction action was brought against him in the Peoples Court of Baltimore City which resulted in a judgment in his favor (R. 9, 10). Upon appeal to the Baltimore City Court this judgment was reversed (R. 4) upon the ground that the property was used predominantly for business purposes, and was therefore not subject to the Rent Control Acts (Appendix B, *infra,* pp. 19-23). Petitioner's appeal to the Court of Appeals of Maryland was

dismissed on the ground that the Court lacked jurisdiction to entertain an appeal from a judgment of the Baltimore City Court acting in the exercise of its appellate jurisdiction over a judgment of the People's Court (R. 24-29. See also *Berlinsky* v. *Eisenberg,* 59 Atl. 2d 327). On December 23, 1948, petitioner brought the instant suit in the United States District Court for the District of Maryland complaining that the landlords had not complied with the rent regulations, and that the Housing Expediter had arbitrarily and unlawfully failed to act in his behalf by refusing to have the alleged unlawful eviction enjoined (R. 2-5). As relief, petitioner prayed that the court order the Housing Expediter to carry out his duties under the federal statutes, and to prohibit the Sheriff of Baltimore City from evicting him from the property (R. 5). The Housing Expediter was served at his office in Washington, D. C. (R. 14, 15). The other defendants, Walter R. Heath, Area Rent Director of the Baltimore Defense-Rental Area, and Joseph Deegan, Sheriff of Baltimore were served in Baltimore.

Respondent Tighe E. Woods, Housing Expediter, filed a motion to dismiss on the ground that the United States District Court had no jurisdiction over his person (R. 14). Respondent Walter R. Heath filed a motion to dismiss upon the grounds that as Area Rent Attorney, he was a subordinate official subject to the orders of the Housing Ex-

pediter and could not be sued or enjoined unless the Housing Expediter was made a party to the action; that the complaint failed to state a claim upon which relief could be granted; and that the suit was against the United States of America which had not consented to be sued (R. 13).

The district court dismissed the complaint upon the ground that the matter had become *res judicata,* stating, "there is nothing which this Court may properly do at this time" and "it is unnecessary to consider the other questions raised by defendants' motions" (R. 16-19). On appeal the court below affirmed the judgment of the district court upon the grounds that there was no jurisdiction over the Housing Expediter since his official residence was in the District of Columbia; that he was an indispensable party to the action with the result that the action must also be dismissed as against the Area Rent Attorney and Sheriff of Baltimore City; and that the complaint sought "to control and direct the character of the action which the Housing Expediter should take in a field committed by the statute to his judgment and discretion," and therefore failed to state a claim upon which relief could be granted (R. 27-30).

ARGUMENT

1. The court below was manifestly right in holding that the district court had no jurisdiction over the person of the Housing Expediter, Tighe E. Woods, and that it could not proceed in the case

without him, since he was an indispensable party to the cause.

(a) The applicable statute, 28 U. S. C. 1391(b), which is a codification of Section 51(a) of the Judicial Code (28 U. S. C. 112 (1946 ed.)), now repealed,[1] plainly gives a defendant in a civil suit brought in a federal district court the privilege of being sued only in the judicial district of which he is a resident. That Section reads as follows:

> (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

In the instant case, it is clear that respondent Woods has at no time since the institution of this suit been a resident of the State of Maryland. Section 206(e) of the Housing and Rent Act of 1947, as amended, *infra,* p. 18, provides that the principal office of the Housing Expediter shall be in the District of Columbia, and the affidavit filed by respondent Woods in support of his motion to dismiss states that his official residence has at all

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[1] The pertinent part of Section 51(a) of the Judicial Code before the codification of Title 28 read as follows:

> * * * no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; * * *.

times since November 1, 1947, been in the District of Columbia, that his home is not in the State of Maryland, and that he is not an inhabitant of that State (R. 15).

It has long been held under Section 51(a) of the Judicial Code and its substantially similar predecessor statutes that, in the absence of a special statute to the contrary, a civil suit may not be maintained against a defendant without his consent in a federal district court except in the judicial district of which he is a resident at the time of the suit.[2] *Macon Grocery Co.* v. *Atlantic Coast Line R. R. Co.*, 215 U. S. 501; *Male* v. *Atchison, etc. Ry. Co.*, 240 U. S. 97; *Robertson* v. *Labor Board*, 268 U. S. 619; *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165, 168.

Section 51(a) of the Judicial Code made no distinction between a federal officer and a private person (nor does 28 U. S. C. 1391(b) make any such distinction), and both this Court and the lower federal courts have long held and recognized that Section 51(a) afforded the same protection to federal officers as it did to private persons. *Butterworth* v. *Hill*, 114 U. S. 128; *Bradley Lumber Co.* v. *National Labor Relations Board*, 84 F. 2d 97 (C. A. 5), certiorari denied, 299 U. S. 559; *Howard*

[2] Rule 4(f) of the Federal Rules of Civil Procedure which outlines the territorial limits of effective service, provides that "All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. * * *."

v. *United States ex rel. Alexander,* 126 F. 2d 667 (C. A. 10), certiorari denied, 316 U. S. 699, rehearing denied, 317 U. S. 705; *Jewel Productions, Inc.* v. *Morgenthau,* 100 F. 2d 390 (C. A. 2); *Federal Landlord Committee, Inc., et al.* v. *Woods, Housing Expediter,* Civil No. 50-156, S. D. N. Y. (Judges L. Hand, Leibell, and Ryan sitting), decided July 5, 1949 not yet reported.[3] It is elementary, therefore, that this suit against the Housing Expediter, who resides in the District of Columbia, could not be legally maintained in the United States District Court for the District of Maryland without his consent, and it is obvious that the court below committed no error in holding that the suit had been properly dismissed as to the Housing Expediter.

(b) The Housing Expediter was clearly an indispensable party to the suit, and the court below, therefore, committed no error in holding on that ground alone that the suit had been properly dismissed as to respondents Heath, Area Rent Director (referred to in the complaint as Area Housing Expediter), and Deegan, Sheriff of Baltimore City.[4] As the court below stated, "* * * the power to administer the Housing and Rent Control Act

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[3] Copies of the opinion have been lodged with the clerk of this Court.

[4] The sole relief sought against respondent Deegan was to restrain him from evicting petitioner (R. 5), and as the district court observed (R. 19), the landlords caused the eviction of petitioner to be completed after the complaint was filed but prior to the hearing of the case in that court which was held on March 4, 1949.

of 1947, as amended, was lodged in the Housing Expediter by Sections 204[5] and 206 * * *, and the purpose of the suit is to require him to take action in the exercise of his statutory powers" (178 F. 2d at 267). Respondent Heath, Area Rent Director, has no enforcement powers whatever, and the complaint does not allege that he may exercise such power. His powers are strictly limited to the discharge of administrative as distinguished from enforcement duties (12 F. R. 6911). Section 206(b) of the Act as originally enacted vested the right to sue for injunctive relief solely in the Housing Expediter. As amended, Section 206(b), *infra*, pp. 17-18, vests this right now in the United States, which may bring suit at the behest of the Housing Expediter.[6] The complaint requests action by Woods, the Housing Expediter, not by Heath, the Area Rent Director. Should a decree such as is sought by petitioner against respondent Woods be granted against respondent Heath, it could be made effective only if the Housing Expediter should exercise the discretion vested in him by the Housing and Rent Act and institute the suit, since the Area Rent Director has no power,

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[5] The pertinent parts of Section 204 of the Housing and Rent Act of 1947, as amended, are set forth in Appendix A, *infra*, p. 17.

[6] The Attorney General, who has general authority to institute suits on behalf of the United States, has delegated to the Housing Expediter authority to institute enforcement suits in connection with rent control matters. See 14 F. R. 6097-6098.

without revision of his delegated authority, to file a suit on behalf of the United States. Obviously, on this state of facts, the Housing Expediter is an indispensable party under the rule announced by this Court in *Gnerich* v. *Rutter,* 265 U. S. 388, followed in *Webster* v. *Fall,* 266 U. S. 507, and later recognized in *Williams* v. *Fanning,* 332 U. S. 490. In the circumstances, the action was properly dismissed as against respondents Heath and Deegan.

(c) The court below might well have held that the district court had no jurisdiction of this case for any purpose, since the complaint contains no averment that the amount involved exceeds $3,000. United States district courts have jurisdiction in cases based on federal questions or on diversity of citizenship only when the amount involved exceeds $3,000 (28 U. S. C. 1331-1332). The mere fact that the suit is brought against a public officer does not operate to confer jurisdiction upon a federal court if the requisite jurisdictional amount is not shown. *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583, 590; *Koster* v. *Turchi,* 173 F. 2d 605 (C. A. 3); *Hock* v. *250 Northern Ave. Corporation,* 142 F. 2d 435 (C. A. 2). Although this contention was not advanced in the district court, it was asserted in the court below, and may, of course, be considered by this Court *sua sponte. Clark* v. *Paul Gray, Inc., supra,* at p. 588).

2. In addition to its holding that the district court lacked jurisdiction in this case, the court

below observed that the complaint failed to state a claim upon which relief could be granted. This view is undoubtedly sound.

The substance of the complaint was that the Housing Expediter had arbitrarily and unlawfully refused to classify the property as a housing accommodation subject to the Act and Rent Regulations, and had likewise refused to institute proceedings to restrain the landlords' eviction of petitioner from them. Although the complaint alleged that the action arose under the Emergency Price Control Act of 1942 [7] and under the Housing and Rent Acts of 1947 (R. 2), we find no provision in either statute conferring jurisdiction on the district courts over actions such as this (Cf. *Hock* v. *250 Northern Ave. Corporation, supra.* Moreover, the instant action was instituted on December 23, 1948, seeking injunctive relief, and the statute governing rent control at that time was the Housing and Rent Act of 1947, and not the terminated Price Control Act of 1942.

The only provision of the Act of 1947 conferring jurisdiction of a private suit brought by a tenant is Section 205 (50 U. S. C. App., Supp. II, 1895) which limits recovery to statutory damages. The present action is not of this character. Cf. *Hock* v. *250 Northern Ave. Corporation, supra,* at p. 437. Hence, if there was any jurisdiction at all in the

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[7] The Emergency Price Control Act expired by its own terms on June 30, 1947 (50 U. S. C. App. (1946 ed.) 901(b)).

district court, it was present solely as a result of general legal or equitable principles under which a federal court may compel a public officer to perform a ministerial duty, not involving the exercise of either judgment or discretion. *Gaines* v. *Thompson,* 7 Wall. 347, 350.

Authority to have unlawful conduct restrained is conferred upon the Housing Expediter by Section 206(b) of the Housing and Rent Act of 1947, as amended (Pub. Law 31, 81st Cong.), which provides as follows:

> Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act, or any regulation or order issued thereunder, the United States may make application to any Federal, State, or Territorial court of competent jurisdiction for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.[8]

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[8] At the time when petitioner filed his action, Section 206(b) read as follows: "Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this title, he may make application to any Federal, State, or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such provision, and

It is permissive language only and plainly indicates an intention on the part of Congress to vest broad discretion in the Housing Expediter to determine in what circumstances an enforcement suit may be brought by the United States under the Housing and Rent Act. The words, "Whenever *in the judgment of the Housing Expediter* any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act, * * * the United States *may* make application" (Emphasis ours) for an order enjoining such acts or practices, leave no room for the contention that the statute authorizes the courts to require the Housing Expediter to bring suit on behalf of the United States in cases where, in the Housing Expediter's judgment, that course of action is neither required by law nor expedient. In fact, practical considerations may make it inadvisable for the Government to sue for injunctive relief at the request of every dissatisfied tenant who calls upon it to do so. Were

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upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond." [50 U. S. C. App., Supp. II, 1896(b).]

The only material modification of the section made by the amendment is that the suit for injunctive relief must now be brought in the name of the United States instead of the Housing Expediter. Since this is an action for injunctive relief, we assume the provisions presently in effect would govern and require a decree, if granted, to run against the United States, which has not been made a party. See *Ziffrin, Inc.* v. *United States*, 318 U. S. 73.

the Government required to take such action without the exercise of discretion on the part of the Housing Expediter, the courts would be burdened with an inordinately large amount of litigation, much of which would inevitably be lacking in merit. Furthermore, the Housing Expediter has been given the means to employ only a relatively small staff to police millions of housing accommodations subject to control. In view of the magnitude of the task, the Congress obviously recognized that the Housing Expediter must be allowed to exercise a sound discretion in determining the character of the litigation that should be instituted in the interest of both economy and proper enforcement.

In the instant case, petitioner requested the Housing Expediter to bring a suit to enjoin his eviction on the ground that the premises occupied by him were used predominantly as a dwelling rather than as a business establishment as claimed by his landlords. The conclusion of the Housing Expediter not to sue as requested by petitioner was clearly based on the exercise of sound discretion. This is plainly shown by the facts concerning the condition of the building stated in the opinion of the Baltimore City Court in the case of *Eisenberg, et al.* v. *Berlinsky* on appeal from the Peoples Court of Baltimore City (Appendix B, *infra,* pp. 19-23). And the application of the Rent Regulation to those facts in the light of the long adminis-

trative interpretation of the Regulation leaves no doubt that the Housing Expediter's refusal to sue was in keeping with the administrative practice relating to enforcement in the case of structures where business and dwelling uses were combined. See Interpretation 1(a)I of the Rent Regulation[9] (Pike & Fischer's OPA Service, Vol. 14, page 200:851; Appendix B, *infra,* pp. 23-27). Thus, the Housing Expediter did not act in the teeth of the statute or stubbornly refuse to act where the statute commands action, but he merely essayed to exercise the jurisdiction conferred upon him. *Adams* v. *Nagle,* 303 U. S. 532, 543. Accordingly, on familiar principles, the district court could not properly substitute its judgment for that of the Housing Expediter or control the manner in which his discretion should be exercised. *United States* v. *Seaman,* 17 How. 225; *I. C. C.* v. *Waste Merchants Assn.,* 260 U. S. 32; *I. C. C.* v. *United States,* 289 U. S. 385; *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316; *Louisiana* v. *McAdoo,* 234 U. S. 627; *Wilbur* v. *United States,* 281 U. S. 206; *Adams* v. *Nagle, supra.*

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[9] This interpretation was issued in 1942, almost contemporaneously with enactment of the earliest rent control statute, and it has since been recognized that where a structure has combined business and dwelling uses, which are not separable, the property is not subject to the rent regulation if a predominant part of the space is used for business rather than dwelling purposes.

CONCLUSION

The decision of the court below is clearly correct, and further review is not warranted. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
JOHN R. BENNEY,
Attorney.

ED DUPREE,
General Counsel,
LEON J. LIBEU,
Assistant General Counsel.
NATHAN SIEGEL,
Special Litigation Attorney,
Office of the Housing Expediter.

APRIL 1950.

APPENDIX A

The pertinent provisions of the Housing and Rent Act of 1947, 61 Stat. 193 by the Act of February 27, 1948, 62 Stat. 37, the Act of March 30, 1948, 62 Stat. 93, and by Pub. Law 31, 81st Cong. 1st Sess. 50 U. S. C. App., Supp. II, 1891 *et seq.*), read as follows:

Sec. 204. (a) The Housing Expediter shall administer the powers, functions, and duties under this title; and for the purpose of exercising such powers, functions, and duties, and the powers, functions, and duties granted to or imposed upon the Housing Expediter by title I of this Act, * * *. [50 U.S.C. App., Supp. II, 1894(a).]

* * * *

(d) The Housing Expediter is authorized to issue such regulations and orders, consistent with the provisions of this title, as he may deem necessary to carry out the provisions of this section and section 202(c). [50 U.S.C. App., Supp. II, 1894(d).]

Sec. 206. (a) It shall be unlawful for any person to demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations in excess of the maximum rent prescribed under section 204, or otherwise to do or omit to do any act, in violation of this Act, or of any regulation or order or requirement under this Act, or to offer, solicit, attempt, or agree to do any of the foregoing.

(b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of

this Act, or any regulation or order issued thereunder, the United States may make application to any Federal, State, or Territorial court of competent jurisdiction for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

* * * *

(e) The principal office of the Housing Expediter shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place and attorneys appointed by the Housing Expediter may, under such authority as may be granted by the Attorney General, appear for and represent the United States in any case arising under this Act.

APPENDIX B

IN THE BALTIMORE CITY COURT

Case No. 6465-47

HELEN EISENBERG AND SAFE DEPOSIT AND TRUST CO., TRUSTEES, PLAINTIFF

vs.

GARFIELD A. BERLINSKY, 857 N. HOWARD STREET, DEFENDANT

ORAL OPINION OF THE COURT

(Judge E. Paul Mason)

MEMORANDUM OPINION

Mason, J. (orally):

Gentlemen, this is a rather interesting case. It is not the first case we have had along this same line. Of course, the OPA Act works both ways. It is not a single-track railroad. It runs both ways, and sometimes it helps the landlord, and sometimes it helps the tenant. I should say, more often it helps the tenant.

In this Court it has been uniformly held that we are bound by the provisions of the OPA Act; and I remember not long ago we had the question whether two apartments, which a tenant had rented, were rented as a single unit or as two separate apartments. The landlord wanted to charge as if they were two apartments. I rather thought there were two because he collected two rents for them, but the OPA decided it was a single unit and, accepting their ruling on it, I found that it was a single unit,

and that the landlord could not collect any more than what the apartments rented for as a single housing unit. As I say, the Court has followed the Act all the way through, and it must, of necessity, follow it in this case as well.

I find nothing in this case to indicate that the property 857 North Howard Street is subject to the regulations of the OPA, a unit or agency of the Federal Government. It is not registered; it has not been the subject of any housing determination as to the amount of rent. Apparently, there has been no effort by either the landlord or the tenant to regard it as anything else but a business property. Neither party has, apparently, endeavored to have it classed as a dwelling unit, or to have any part classed as a dwelling unit and, if they have, I must assume unsuccessfully because I cannot believe that it was ever registered, not having the evidence before me; and I have the evidence of the plaintiff in the case that it was never registered because they regard it as business property. When you get around to that, what I may call a conclusive presumption on the part of the Court, in addition to that, if I had to determine it without the aid of that presumption, I would still find that it is a business property; and I would determine that by using the OPA regulations, which provide that if a building is predominantly used for business purposes it should be classed as business property. If, on the other hand, the predominant use is for dwelling purposes, it should be considered a dwelling unit; and, if it is severable, that part which is used for business is business, and that part which is used for dwelling is dwelling property.

This property may be severable in the sense it could if it were used in certain ways, partly as a dwelling and partly as a place of business, but the Court finds it has not been so severed. It has been used mainly as a business proposition all the way through. The testimony of Mr. Foster, produced on behalf of plaintiffs, which is not substantially denied, is that the first floor is used for the storage or display of antiques. There are some things in the kitchen which may indicate it is used as such, but there is no gas for cooking. I understand there is an electric stove in there. There is no heating arrangement except the oil stove in the store, and there has been no coal used in the coal stove for many, many days, as the defendant himself has stated, although he did burn wood left from his furniture repair work, finding the wood more accessible. I would have to reach the conclusion that the only part of that floor that was really used for dwelling purposes was that part of the room in the middle which had the couch, which was used for sleeping purposes, but which is not now so used because the defendant has put his couch upstairs.

When you get to the second floor it is found that that part of the premises is filled with antiques all the way through. The bathroom is not usable. It has not been used for a long while. That is something that would be appurtenant to a dwelling use and, frankly, the last thing that the Court can conceive of that is usuable is a worthless or waterless bathroom.

When you get to the third floor what you have up there is a book storage warehouse, primarily.

The back room has some furnishings but, as I get it, there were more books up there than anything else, and they were numerous, and no one is living on the third floor, and no one had been living there for a long while; no heat in the house except in the small stoves on the first floor; no water in the house; no gas in the house; no electricity above the first floor.

On the facts, as well as on the presumption which I have with the property not being registered, the Court would say that the only part of the building that is possibly being used for dwelling purposes would be that part which contains the couch, now on the second floor, and formerly on the first floor. So, I conclude that it was and is a business proposition.

With that in mind, there is not anything the Court can do except to say the plaintiffs must prevail, and that the judgment must be for the plaintiffs for repossession of the property.

Now, I understand there is this question: I understand that the tenant has paid no rent since spring. It would seem the damages in the case should be the amount of the rent from that time. It is perfectly true he has tendered it while, on the other hand, the landlord has not received it, and I see no reason why the landlord should be without it.

The judgment of the Court will be for plaintiffs with damages that aggregate the amount of the rent due from the tenant from the time the last rent was paid up until such reasonable time as I would stay the proceedings to allow the tenant to vacate. When is the rent payable?

Mr. BUTLER: On the first of the month.

The COURT: Have you calculated those damages?

Mr. BUTLER: $200.00, may it please your Honor, being five months at $40.00 per month.

The COURT: The judgment will be for restitution of the property, $200.00 damages, and costs, and stay of execution of ejection until the last day of this month.

OCTOBER 27, 1947

INTERPRETATION 1 (a)-I

(Pike and Fischer's OPA Service, Vol. 14, page 200:851)

STRUCTURES IN WHICH BUSINESS AND DWELLING USES ARE COMBINED

Housing accommodations are defined in Section 13 (a) (6) of the Housing Regulation as *"any building, structure, or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes, together with all privileges, services, furnishings, furniture, equipment, facilities and improvements connected with the use or occupancy of such property."* A similar, though not identical, definition is contained in Section 13 (a) (6) of the Hotel Regulation.

Structures not "rented or offered for rent for living or dwelling purposes" are not subject to the Rent Regulation. Nevertheless, buildings or structures in which business and dwelling uses are combined may, under some circumstances, be subject to the Regulation.

If within the same structure there are two portions, one of which is devoted exclusively to a business or commercial use and the other of which is devoted exclusively to a living or dwelling use, the Regulation will not apply to the business or commercial portion if it is rented to a separate tenant. This is true even though, at some earlier date, the two portions were rented to one tenant, under a single lease calling for a single rent. The necessity for determining whether the business portion is regulated arises only where, on or after effective date, the two portions are rented to the same tenant.

In determinations as to the extent of control of property used for both dwelling and business purposes, two tests are to be used: First, are the business and dwelling portions separable and, second, if they are not, what is the predominant use? If the business and dwelling portions are separable, only the dwelling portion is subject to the Regulations. If they are not separable, then either both portions are subject to the Regulation or neither is controlled. The result under such circumstances depends upon predominant use.

SEPARABILITY

If the physical characteristics of the property are such that it is feasible for the tenant to remain in occupancy of the dwelling portion while some other person is using the business portion, the two portions are separable.

The business and dwelling portions are separable in either of the following cases:

(1) Where they are in separate structures.

(2) Where they are in the same structure, but

(*a*) There are separate means of access, and

(*b*) The dwelling portion is usable as a dwelling without the need for access to the business portion, and

(*c*) The use of the business portion does not require access to the dwelling portion, and

(*d*) The dwelling portion is, or can readily be, completely shut off from the business portion.

To illustrate the second situation: It is common for a structure to contain a store on the first floor and an apartment or other dwelling unit on the second floor. The entrance to the apartment is through a stairway which runs alongside, but outside, the store, so that the tenant of the dwelling has access thereto without going through the store. The store and apartment are separable and only the apartment is regulated.

Premises which do not in some particular respect comply with the specific tests of separability just stated may nevertheless be found separable where it is very clear that, by the standards and practices of the community, it is feasible for the tenant to occupy the dwelling portion while the business portion is being used by some other person.

Where the premises are separable, so that only the dwelling portion is subject to the Regulation, it will often be necessary to make an apportionment of the rent on the date determining the maximum rent in order to establish the maximum rent for the dwelling. Thus, it may be that, on maximum rent date, the landlord rented both portions to the same tenant under a single lease calling for one rent.

The rent for the dwelling portion is to be established by apportionment, and the landlord, in the first instance, may make such apportionment. The apportionment must be fair and reasonable.

However, if the landlord chooses, he may, within 30 days after the effective date of the Regulation, file a petition under Section 5 (d) for a determination of the maximum rent, on the ground that it is in doubt, or in dispute, or unknown. The Rent Director at any time, on his own initiative, may institute proceedings under Section 5 (d) to determine the maximum rent, on the same ground. Likewise, if the landlord makes his own apportionment, the Rent Director may review it by proceeding on his own initiative under Section 5 (d). His determination in either case will be made on the basis of how much of the total rent is fairly and reasonably to be allocated to the dwelling.

PREDOMINANT USE

If the business and dwelling portions are not separable according to the tests set out above, the two portions are to be treated as a unit for purposes of determining whether the property is subject to the Regulation. The initial test of predominent use is to be made on a space basis. If a predominant part of the space is used for business purposes, the property is not subject to the Regulation. Where less than a predominant part of the space is used for business purposes (and also where the space test cannot be used because there is no physical segregation of the space used for business purposes and that used for dwelling purposes), a second test of predominant use, in terms of rental value, is to be

used. If the rental value of the business portion (or of the business use, where the two uses are not physically segregated) is clearly in excess of the rental value of the dwelling portion, the property is not subject to the Regulation; otherwise it is subject.

Thus the property as a unit is free of control by the Regulation where either (1) the predominant use, on a space basis, is for business purposes, *or* (2) the rental value of the business portion is clearly in excess of the rental value of the dwelling portion. If neither of these tests is satisfied, the property as a unit is subject to the Regulation.

It should be pointed out, however, that if housing accommodations within the structure are subleased, such accommodations are subject to regulation without regard to regulation of any other part of the structure.

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